No. 83-435

In the Supreme Court of the United States

OCTOBER TERM, 1983

WICHITA BOARD OF TRADE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether in a proceeding involving a non-recurring question about the manner in which private litigants may pursue their claims for monetary damages arising from an Interstate Commerce Commission rate decision that has been before this Court on two prior occasions, the court of appeals erred in concluding that the Commission has primary jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 706 F.2d 1067 (10th Cir. 1983). The opinion and refund order of the United States District Court for the District of Kansas (Pet. App. A12-A21) is unreported. The decision of the Interstate Commerce Commission (Pet. App. A133-A152), which was issued in part pursuant to the mandate of this Court and which was addressed in the district court opinion, is reported at 359 I.C.C. 624 (1979). The order of this Court vacating an earlier district court refund order and directing the district court to remand the matter to the Commission (Pet. App. A153) is reported at 433 U.S. 902 (1977). The underlying decision of this Court out of which this litigation originally arose (Pet. App. A30-A62) is reported at 412 U.S. 800 (1973).

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1983, and a petition for rehearing was denied on June 16, 1983 (Pet. App. A169-A170). The petition for a writ of certiorari was filed on September 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The essential facts and procedural history of this protracted litigation are set out in the opinion of the court of appeals (Pet. App. A2-A5). The basic question is whether a reviewing court may directly award refunds of railroad rates that the Interstate Commerce Commission found were not shown to be just and reasonable, or whether the parties must instead seek relief initially before the ICC.

1. The petition involves one small thread of a larger controversy that has otherwise been fully resolved. The matter originated in 1970 when the western railroad respondents filed a tariff proposing a new charge for the inspection of grain in transit. While the proposal was pending before the ICC, the charge was suspended. Although the statutory suspension period expired before the Commission completed its inquiry, the carriers voluntarily postponed implementing the new tariff until final agency action. In 1971 the Commission granted its approval and the tariff containing the grain inspection charge became effective.

Eventually the carriers collected the new charge for some four years while various judicial and administrative proceedings were pending. In 1972, a three-judge district court in Kansas set aside the Commission's decision and suspended the effectiveness of the tariff (Pet. App. A22-A29). Shortly thereafter, this Court stayed the district court order (Pet. App. A63-A64) and directed that the carriers keep account of amounts collected under the new charge. This

"keep account" order was in effect for approximately one year, until the Court's decision on the merits was rendered on June 18, 1973 (412 U.S. 800). In a plurality opinion, the Court affirmed the district court's order setting aside the ICC decision, but reversed the portion of the district court order that had suspended the new charge. The Court concluded that the Commission, rather than the district court, had the responsibility to determine the rate the carriers could charge.

2. On remand, the Commission concluded in 1975 that the carriers had not affirmatively justified the separate grain inspection charge (Pet. App. A117-A132). Accordingly, it ordered the tariff cancelled, but it did not order that amounts already paid be refunded to shippers. In subsequent proceedings, the district court directed that carriers refund charges collected during the pendency of this Court's "keep account" order (a period of approximately one year) (Pet. App. A155-A167). It did not, however, order refunds of amounts paid by the same parties under the same tariff prior or subsequent to the "keep account" order.

The carriers sought review of that decision in this Court. At that time, the government proposed that the district court order be set aside because it interfered with the ICC's primary jurisdiction to determine whether refunds should be awarded, and also because it was inconsistent with the disposition of the same issue by the District of Columbia Circuit in a parallel proceeding, *Secretary of Agriculture* v. *ICC*, 551 F.2d 1329 (1977), petition for review dismissed mem., No. 76-1026 (Aug. 16, 1979), that had been remanded to, and was then pending before, the Commission.[1]

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[1]Unlike the present case, which carves out only the one-year period covered by this Court's "keep account" order, the *Secretary of Agriculture* case involved a broad request for refund of all charges collected during the four-year pendency of the grain inspection tariff (including

Following the suggestion of the government, this Court vacated and remanded the district court's refund order and directed the district court to remand the case to the Commission for further consideration in connection with the remand in *Secretary of Agriculture* v. *ICC*. 433 U.S. 902 (1977). The district court remanded the case to the Commission for consideration of the question of refunds.

3. The Commission, pursuant to the remands from the district court and the District of Columbia Circuit, issued a decision explaining why it denied blanket refunds and establishing procedures under which shippers could seek monetary relief in individual complaint proceedings under 49 U.S.C. (Supp. V) 11701 (Pet. App. A133-A152). None of the shippers, including the petitioners here, sought review of that ICC order.[2]

Nor did petitioners avail themselves of the Commission's complaint procedures. Instead, they returned to the district court. Despite the Commission's decision and this Court's 1977 remand order, the district court then reissued its refund order (Pet. App. A12-A21). On appeal, the Tenth Circuit set aside the district court's order on the ground that the ICC has primary jurisdiction over questions of refunds or damages arising out of rate decisions. Since the district court was not the appropriate forum for seeking judicial review in these circumstances the court of appeals concluded that the refund order was entered without jurisdiction.

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the charges involved here). In *Secretary of Agriculture*, the District of Columbia Circuit concluded that the ICC had discretion in deciding whether automatic refunds were appropriate. The court set aside the ICC decision, however, because the Commission had not adequately explained why it had chosen not to award blanket refunds.

[2]The government did, however, move in the District of Columbia Circuit for dismissal of the petition for review in the *Secretary of Agriculture* case. On August 16, 1979, that court issued an order dismissing the petition for review and relinquished its reserved jurisdiction over the case (App., *infra*, 1a-2a).

ARGUMENT

The court of appeals correctly concluded that the district court lacked jurisdiction to enter an order granting refunds following the ICC's decision rejecting blanket refunds. That decision is fully consistent with this Court's earlier actions in this case on two prior occasions. Moreover, because the petition raises a question that is not likely to recur, it does not warrant further review by this Court.

1. The court of appeals concluded that the Commission has primary jurisdiction and thus must initially determine whether refunds or damages should be awarded in connection with interstate railroad rate decisions. This Court's decision in *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), as amplified and explained in subsequent decisions,[3] has made it quite clear that reviewing courts may not enjoin rates or otherwise issue orders that operate to fix rates. A refund or reparations order is intimately tied to the Commission's responsibility to fix rates, *Burlington Northern, Inc.* v. *United States*, No. 81-1008 (Dec. 13, 1982), slip op. 9-10, and indeed it has the same effect as an order setting rates. Therefore, when reviewing courts order refunds, they do indirectly what this Court has repeatedly stated they may not do directly.

2. Petitioners argue (Pet. 11-13) that a reviewing court's inherent equity powers authorize it to award refunds, citing *United States* v. *Morgan*, 307 U.S. 183 (1939). *Morgan* arose under a statutory provision that, unlike former Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7),[4] did not provide for agency discretion to award refunds.

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[3]The most recent such decision is *Burlington Northern, Inc.* v. *United States*, No. 81-1008 (Dec. 13, 1982).

[4]See *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade*, 412 U.S. at 812-813.

Further, *Morgan* involved a situation, unlike the present case, in which the district court exercised its equity jurisdiction in aid of the agency's determination, not to frustrate it. *Morgan* is, accordingly, distinguishable.[5] If any further

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[5]Petitioners' other claims that the decision below conflicts with prior decisions of this Court are similarly incorrect.

Petitioners argue (Pet. 15-17) that the decision is inconsistent with *A.J. Phillips Co.* v. *Grand Trunk Western Ry.*, 236 U.S. 662 (1915). It is apparently petitioners' contention that *Grand Trunk Western* requires automatic refunds of any rate that is ultimately disallowed by the Commission and invests the district courts with primary jurisdiction to award such refunds. In *Grand Trunk Western*, the Court affirmed the dismissal of a suit brought by a shipper who paid a rate later found to be unreasonable and unjust (236 U.S. at 664). While the opinion contains dicta suggesting the appropriateness of judicial remedies in certain situations, any possibility that such remedies were available here was set to rest in this Court's 1973 decision in this case. As the Court recognized, 412 U.S. at 813, 814 & n.9, the railroads' failure to sustain their burden of proving the reasonableness of a rate (as opposed to a finding that the rate is affirmatively unlawful, as occurred in *Grand Trunk Western*), does not create an automatic entitlement to refunds. Cf. *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry.*, 284 U.S. 370, 389 (1932) (damages inappropriate when carriers publish rates pursuant to a Commission order that is later modified). The same conclusion can be drawn from the Court's 1977 action vacating the district court's refund order (433 U.S. 902). See also *Arizona Grocery Co.*, 284 U.S. at 385 (Commission determines reasonableness and reparations, "and only the enforcement of the award was relegated to the courts"). Most recently in *Burlington Northern*, the Court again confirmed that only the Commission can issue an order (such as a refund order) that operates to fix rates (slip op. 7-9).

Petitioners also contend (Pet. 17-18) that the decision below conflicts with *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 312 U.S. 621 (1941) on the question whether only a three-judge court, rather than a single judge, was empowered to pass on their claims. This argument is without merit. As petitioners concede (Pet. 17), the court of appeals did not base its decision on the different jurisdictions of single versus three-judge courts. In fact, the court of appeals (Pet. App. A7) expressly "decline[d] to reverse because of [the] assertion of power by one judge"; instead it reversed because primary jurisdiction was vested in the ICC and the district court's order was, accordingly, substantively incorrect. Thus, even if the decision is inconsistent with *Brashear*, that issue is not properly before this Court.

authority is needed to show that *Morgan* is not controlling, it was provided by this Court's action the last time this case was before it. In 1977 when the carriers sought review of the district court's earlier refund order, the present petitioners relied heavily on their argument based on *Morgan* in urging this Court to affirm. See Motion to Affirm in *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade*, No. 76-1503, at 8-10. The Court did not accept those arguments. Rather, it vacated the district court's first refund order, and remanded the matter to the Commission (433 U.S. 902). In that earlier proceeding, the government voiced its "concern[s] with preserving the proper allocation of functions between the Commission and reviewing courts," Memorandum for the United States and the ICC in No. 76-1503, at 1 n.1. As we pointed out then (*id.* at 4), a reviewing court's equity power:

> does not obviate appropriate deference to the Commission's primary jurisdiction over regulatory questions inextricably intertwined with the equitable aspects of refunding charges collected while the rates were lawfully in effect. See *Moss* v. *Civil Aeronautics Board*, 521 F.2d 298, 308-309, 314-315 (C.A.D.C.), certiorari denied *sub nom. Roberts* v. *Civil Aeronautics Board*, 424 U.S. 966; *Southern Ry. Co.* v. *United States*, 412 F. Supp. 1122, 1147-1148, 1150-1151 (D.D.C.); *Atchison, T. & S.F. Ry. Co.* v. *Baltimore & O.R.R. Co.*, E.D. Pa., No. 74-1859, decided June 22, 1976. That principle of deference should apply with particular force here since the Commission now has before it the same issue that the district court undertook to decide. To allow the district court's decision to stand risks a conflict in results between the court's disposition of the charges collected during the one-year stay period and the Commission's decision as to such charges for the full four-year period [that the challenged rates were in effect].

In their present effort to overturn the lower court's decision, petitioners are not only asking this Court to allow the district court to set rates, they are also asking this Court to overrule its own 1977 order and to permit conflicting results between the disposition of the funds collected by the railroads during the one-year stay period and the full period that the rates at issue were in effect.

3. The petition should also be denied because the unique circumstances of this case will not likely recur. This Court entered its "keep account" order in response to the district court's initial effort to prescribe rates that the railroads could charge. As a result of this Court's 1973 decision in *Atchison, T. & S. F. Ry.* v. *United States* and its progeny (most recently *Burlington Northern*), it is highly unlikely that a reviewing court will in the future issue an order attempting to set railroad rates. Hence, we believe that the questions raised in the petition will not arise again and do not warrant an exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

DOJ-1983-12

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1026

September Term, 1978

Secretary of Agriculture of the United States,
Petitioner

v.

Interstate Commerce Commission and United States of America,
Respondents

Western Railroads, et al.,
Intervenors

United States Court of Appeals for the District of Columbia Circuit

FILED AUG 16 1979

GEORGE A. FISHER
clerk

BEFORE: Bazelon, Senior Circuit Judge; Tamm and MacKinnon, Circuit Judges

ORDER

Upon consideration of respondent's motion to dismiss petition for review, and of the response thereto filed by the amici curiae, it is

ORDERED, by the Court, that respondent's aforesaid motion to dismiss is granted and the Clerk is directed to note the docket accordingly.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher

GEORGE A. FISHER
Clerk

A true copy:

Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit

By: [illegible] Deputy Clerk